Goh Swee Oh @ Khoo Swee Cheng & Ors v Heng Ji Keng & Anor

HIGH COURT (KUALA LUMPUR) — NOTICE OF MOTION NO D9(D6)-25–7 OF 2007
VARGHESE GEORGE JC
10 OCTOBER 2010

Companies and Corporations — Winding up — Liquidators — Remuneration — Liquidator's remuneration — Application for ratification — Whether court's approval must be sought before remuneration is payable to liquidators' from available funds of company under liquidation — Whether shareholder entitled to be heard on the application — Whether shareholders' grievances could be heard and determined under s 305 of Companies Act 1965 — Whether liquidators' claim for disbursements and remuneration should be allowed

Companies and Corporations — Winding up — Liquidators — Legal proceedings — Court proceedings involving company in liquidation — Stay application brought by shareholders — Whether liquidators' could intervene in proceedings if interests of company or their position as liquidator called into question — Whether liquidators' right to intervene restricted to proceedings 'in the name and on behalf of' the company

Companies and Corporations — Winding up — Liquidators — Liquidators application — Ratification of legal costs — Payment made from available funds of company — Whether outside scope of liquidators' duties — Whether payment tainted with illegality or 'collusion' to cause depletion of available funds — Whether payments should not be upheld

The company in liquidation was one Fokas Perkasa Sdn Bhd which was ordered to be wound up by the court on 11 March 2004 vide a petition presented by one Serampai Istimewa Sdn Bhd. Initially, the official receiver was appointed by the court to be the liquidator of the company. However on 21 July 2004, Mr Heng and Mr Monteiro were appointed by the court as liquidators of the said company to replace the official receiver. The present proceedings was brought by three shareholders/contributories of the said company against Mr Heng and Mr Monteiro for declarations that three items of payments made by them in their capacity as liquidators were not lawful and that they should be made personally accountable to repay those sums to the funds of the company under liquidation. The liquidators, on the other hand, applied to ratify the three items of payments and further, for an approval of this

court to make one other additional payment. The payments in contention between the parties which was paid out from the funds of the company in liquidation were as follows: (a) the remuneration payment to Mr Heng and Mr Monteiro, as the liquidators, in the sum of RM93,937.95; (b) the cost of the winding up petition awarded to the petitioner in the sum of RM65,000, which had been paid to one Mr Lum, a Director then of Serampai Istimewa Sdn Bhd ('the petitioner'); and (c) the legal costs incurred by the liquidators' totalling a sum of RM66,420 paid to the following legal firms: (i) Messrs Lee Swee Seng & Co; (ii) Messrs HL Teh & Associates; and (iii) Messrs Wan Ewe Chong & Khoo. The 'payment' which had yet to be effected but for which approval of this court was sought was the cost and expenses in the sum of RM34,818 outstanding and due to another legal firm namely, Messrs Lai & Associates. Thus, this court had to consider the above complaints of the shareholders/contributories. In respect of the issue pertaining to the remuneration of the liquidator, the liquidators raised a preliminary question as to the competency of the shareholders/contributories to bring proceedings to challenge the liquidator's remuneration.

Held, dismissing shareholders/contributories application with costs:

(1) In an application brought pursuant to s 232(3)(c) of the Companies Act 1965 ('the Act'), a shareholder was not entitled to bring or be heard on an issue related to remuneration of a liquidator. Notwithstanding the same, since this court was also simultaneously disposing the application brought by the shareholders in Suit D6–25–7 of 2007, the shareholders could, pursuant to s 305 of the Act, seek to have their grievances in respect of the 'remuneration' of the liquidator also determined by the court that is, overriding the limitation on shareholders that was obvious from a reading of s 232(3)(c) (see para 9).

(2) In a situation where there is no committee of inspection in place (to fix remuneration of a liquidator), it would make no sense at all to impose a condition that the private liquidator appointed by the court to take charge of a winding up process, must in all instances approach the court first for approval before being paid remuneration from available funds of the company under liquidation. In a similar vein, there is no condition imposed anywhere for approval to be obtained for all expenses and disbursements before it is incurred. If such a condition were to be read into the provisions (where there is none), it would no doubt mean delay, additional work and expenses to be incurred by the liquidator and that could not have been the intention of the legislature in regulating the liquidation process. In fact, there are sufficient safeguards in the statutes, including that for shareholders (s 305), to check the liquidator in so far as the latter issue of reasonableness of their remuneration and expenses are concerned or generally their conduct in that capacity (see paras 14–15).

(3) Customarily, in professional practice, all disbursements are reimbursable; some may be supported by receipts, but normally such reimbursables would follow charges fixed by the practice, like for instance, mileage claims of different category of staff/officers, photocopying charges etc. As regards the remuneration charged, the summary of work provided did not appear to be outside the scope of a normal liquidator's duties and functions, and given the time span, Mr Heng and Mr Monteiro were in office, this court did not find anything exceptional or untoward to substantiate any grounds at all to strike down the same. Therefore, this court was satisfied that the appropriation of the said sum of RM93,937.95 by Mr Heng and Mr Monteiro was approved and/or ratified (see paras 20–21).

(4) In relation to the second item in dispute namely, a sum of RM65,000 paid out by Mr Heng and Mr Monteiro as 'agreed cost' to Mr Lum, a Director of Serampai Istimewa Sdn Bhd, the petitioner, the 'shareholders' had the burden to show that this payment was outside the scope of the liquidators' duties and was one tainted with illegality or 'collusion' to cause a depletion of the available proceeds of the company in liquidation. There was no such evidence. The shareholders had not discharged the burden on them as aforesaid to strike down this payment and to make Mr Heng and Mr Monteiro, personally liable for the amount involved (see para 25).

(5) In respect of legal costs paid by the liquidator to three firms of solicitors, totalling to a sum of RM66,420, the payment made to Messrs Lee Swee Seng & Co (RM5,507) and to Messrs Wan Ewe Chung & Khoo (RM6,800) were in respect of opinions rendered by the said firms to Mr Heng and Mr Monteiro. This court failed to find any reasons why these payments should not be upheld. The shareholder's argument that more details of legal work were required was totally unmeritorious. The sum paid out to Messrs HL Teh and Associates (RM54,113) and the sum of RM34,818 yet to be paid to Messrs Lai & Associates (for which approval was being sought by Mr Heng and Mr Monteiro here) both relate to a court proceedings which involved a stay application brought by the shareholders themselves in respect of the order of the court to wind up Fokas Perkasa. Mr Heng and Mr Monteiro had stepped into the shoes of the directors of the company once the winding up order was granted. The liquidator had legitimate concerns not just about the progress of the winding up process but also because there were serious allegations made personally against Mr Heng and Mr Monteiro. They had to defend themselves in that capacity and the liquidator was therefore a necessary party since they were liable to be sued for monies unless all relevant facts were adequately set before the court. The liquidator was not restricted by s 236(2) but could intervene or include themselves if the interests of the company being wound up or their position as liquidator of the company

is called into question in court proceedings. It was not restricted to proceedings 'in the name and on behalf of' the company (see paras 27–28, 31–32 & 34).

[Bahasa Malaysia summary

Syarikat yang dibubarkan ialah Fokas Perkasa Sdn Bhd yang telah diarahkan untuk digulungkan pada 11 Mac 2004 melalui satu petisyen yang diserahkan oleh Serampai Istimewa Sdn Bhd. Pada mulanya, pegawai penerima dilantik oleh mahkamah untuk menjadi likuidator-likuidator syarikat tersebut. Walau bagaimanapun, pada 21 Julai 2004, En Heng dan En Monteiro telah dilantik oleh mahkamah sebagai likuidator-likuidator bagi syarikat tersebut menggantikan pegawai penerima. Prosiding-prosiding ini dikemukakan oleh ketiga-tiga pemegang-pemegang saham/penyumbang-penyumbang syarikat tersebut terhadap En Heng dan En Monteiro untuk deklarasi-deklarasi bahawa ketiga-tiga butiran bayaran yang dibuat oleh mereka dalam kapasiti mereka sebagai likuidator-likuidator adalah tidak sah dan bahawa mereka seharusnya bertanggungjawab secara peribadi untuk membayar jumlah tersebut kepada dana-dana syarikat yang dibubarkan. Likuidator-likuidator tersebut, bagaimanapun, memohon untuk mengesahkan ketiga-tiga butiran bayaran dan selanjutnya, mendapatkan kebenaran mahkamah ini untuk membuat satu bayaran tambahan. Bayaran-bayaran yang dihujahkan di antara pihak-pihak dibayar daripada dana-dana syarikat yang dibubarkan adalah seperti berikut: (a) bayaran gaji kepada En Heng dan En Monteiro, sebagai likuidator-likuidator, berjumlah RM93,937.95; (b) kos petisyen penggulungan diawardkan kepada pempetisyen berjumlah RM65,000, yang telah dibayar kepada En Lum, Pengarah kepada Serampai Istimewa Sdn Bhd ('pempetisyen'); dan (c) kos-kos guaman yang ditanggung oleh likuidator-likuidator berjumlah RM66,420 dibayar kepada firma-firma guaman seperti berikut: (i) Messrs Lee Swee Seng & Co; (ii) Messrs HL Teh & Associates; dan (iii) Messrs Wan Ewe Chong & Khoo. 'Bayaran' yang belum lagi dibuat tetapi kebenaran mahkamah dituntut ialah berhubung kos dan perbelanjaan berjumlah RM34,818 yang terhutang dan belum dibayar kepada satu firma guaman yang dikenali sebagai Messrs Lai & Associates. Oleh itu, mahkamah ini perlu mempertimbangkan aduan-aduan pemegang-pemegang saham/ penyumbang-penyumbang di atas. Berkenaan isu gaji likuidator, likuidator-likuidator mengemukakan persoalan permulaan mengenai kompetensi pemegang-pemegang saham/penyumbang-penyumbang untuk mengemukakan prosiding-prosiding untuk mencabar gaji likuidator-likuidator.

Diputuskan, menolak permohonan pemegang-pemegang saham/penyumbang-penyumbang dengan kos:

(1) Di dalam permohonan yang dikemukakan menurut s 232(3)(c) Akta Syarikat 1965 ('Akta'), seorang pemegang saham tidak berhak untuk

mengemukakan atau didengari berkaitan isu yang berhubungkait dengan gaji seorang likuidator. Namun begitu, memandangkan mahkamah ini juga pada masa yang sama menolak permohonan yang dibuat oleh pemegang-pemegang saham dalam Guaman D6–25–7 of 2007, pemegang-pemegang saham seharusnya, menurut s 305 Akta, menuntut agar ketidakpuasan hati mereka berkenaan 'gaji' likuidator juga ditentukan oleh mahkamah, iaitu dengan mengatasi had pemegang-pemegang saham yang jelas daripada pembacaan s 232(3)(c) (lihat perenggan 9).

(2) Di dalam situasi di mana tidak terdapat jawatankuasa pemeriksaan (untuk menentukan gaji seorang likuidator), maka adalah tidak munasabah untuk mengenakan syarat bahawa likuidator persendirian yang dilantik oleh mahkamah untuk mengambilalih proses penggulungan perlu mendapatkan kebenaran mahkamah terlebih dahulu sebelum dibayar gaji melalui dana-dana yang boleh didapati daripada syarikat yang dibubarkan. Bertunjangkan perkara yang sama, tidak terdapat syarat dikenakan di mana-mana agar kebenaran didapatkan untuk kesemua perbelanjaan dan pembayaran-pembayaran sebelum perbelanjaan dan pembayaran-pembayaran tersebut dilakukan. Sekiranya syarat sedemikian dibaca di dalam peruntukan-peruntukan (di mana tidak terdapat), tanpa syak lagi ini mengakibatkan kelewatan, kerja-kerja tambahan dan perbelanjaan-perbelanjaan perlu ditanggung oleh likuidator dan ini bukanlah tujuan badan perundangan dalam mengawal selia proses pembubaran. Malah, terdapat perlindungan-perlindungan mencukupi di dalam statut-statut, termasuk untuk pemegang-pemegang saham (s 305), untuk memeriksa likuidator mencakupi isu kemunasabahan gaji mereka dan perbelanjaan-perbelanjaan yang terlibat atau secara umumnya, tindakan mereka di dalam kapasiti tersebut (lihat perenggan 14–15).

(3) Lazimnya, dalam amalan profesional, kesemua pembayaran boleh dikembalikan; sesetengahnya disokong oleh resit-resit, tetapi kebiasaannya pengembalian bayaran tersebut adalah mengikut caj-caj yang ditetapkan oleh amalan, contohnya, tuntutan-tuntutan perbatuan (*mileage claims*) bagi kategori-kategori staf/pegawai berlainan, caj fotokopi dan lain-lain. Merujuk kepada gaji yang perlu dibayar, rumusan kerja yang diperuntukkan tidak berada di luar skop tugas-tugas dan fungsi-fungsi seorang likuidator yang normal dan melihat kepada jangka masa En Heng dan En Monteiro bertugas, mahkamah ini tidak mendapati apa-apa yang luar biasa atau tidak diingini untuk menyokong mana-mana alasan untuk menolak gaji tersebut. Oleh itu, mahkamah ini berpuas hati bahawa peruntukan sejumlah RM93,937.95 oleh En Heng dan En Monteiro dibenarkan dan/atau disahkan (lihat perenggan 20–21).

(4) Berkenaan butiran kedua yang dipertikaikan iaitu, sejumlah RM65,000 dibayar oleh En Heng dan En Monteiro sebagai 'kos yang dipersetujui' kepada En Lum, Pengarah kepada Serampai Istimewa Sdn Bhd, pempetisyen, 'pemegang-pemegang saham' mempunyai beban untuk menunjukkan bahawa bayaran ini di luar skop tugas-tugas likuidator dan dicemari ketaksahan atau 'pakatan sulit' untuk menyebabkan kekurangan hasil-hasil tersedia syarikat yang dibubarkan. Tidak terdapat keterangan sedemikian. Pemegang-pemegang saham tidak menolak beban yang dikenakan ke atas mereka untuk membatalkan bayaran ini dan menjadikan En Heng dan En Monteiro bertanggungan secara peribadi untuk jumlah yang terlibat (lihat perenggan 25).

(5) Berhubung kos-kos guaman yang dibayar oleh likuidator kepada ketiga-tiga firma peguamcara berjumlah RM66,420, bayaran dibuat kepada Messrs Lee Swee Seng & Co (RM5,507) dan Messrs Wan Ewe Chung & Khoo (RM6,800) adalah berkaitan pendapat-pendapat yang diberikan oleh firma-firma tersebut kepada En Heng dan En Monteiro. Mahkamah ini gagal untuk mendapati alasan-alasan di mana bayaran ini tidak sepatutnya dibuat. Hujahan pemegang-pemegang saham bahawa kerja-kerja guaman yang lebih terperinci diperlukan adalah sama sekali tanpa merit. Jumlah yang dibayar kepada Messrs HL Teh and Associates (RM54,113) dan sejumlah RM34,818 belum lagi dibayar kepada Messrs Lai & Associates (di mana kebenaran dituntut oleh En Heng dan En Monteiro di sini), kedua-duanya merujuk kepada prosiding-prosiding mahkamah yang melibatkan permohonan penggantungan yang dikemukakan oleh pemegang-pemegang saham itu sendiri berkaitan perintah mahkamah untuk menggulungkan Fokas Perkasa. En Heng dan En Monteiro telah mengambilalih sebagai pengarah-pengarah syarikat apabila perintah penggulungan dibenarkan. Likuidator-likuidator mempunyai kebimbangan sah bukan sahaja mengenai proses penggulungan tetapi juga kerana terdapat tuduhan-tuduhan serius yang dibuat secara peribadi terhadap En Heng dan En Monteiro. Mereka perlu membela diri mereka di dalam kapasiti tersebut dan likuidator adalah pihak yang penting memandangkan mereka bertanggungan didakwa untuk wang melainkan kesemua fakta relevan dikemukakan di mahkamah. Likuidator tidak dihadkan oleh s 236(2) tetapi boleh masuk campur atau melibatkan diri mereka sekiranya kepentingan syarikat yang digulungkan atau kedudukan mereka sebagai likuidator syarikat dipersoalkan di prosiding-prosiding mahkamah. Ia tidak terhad kepada prosiding-prosiding 'di atas nama dan bagi pihak' syarikat (lihat 27–28, 31–32 & 34).]

Notes

For cases on liquidators, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1368–1420.

Cases referred to

Perumahan NCK Sdn Bhd v Mega Sakti Sdn Bhd (No 2) [2005] 7 MLJ 389; [2005] 7 CLJ 370, HC (refd)

Bridal Central Co Pte Ltd, Re (1985) 9 ACLR 481 (refd)

Legislation referred to

Companies Act 1965 ('the Act') ss 232(3), (3)(a), (b), (c), (4), (5), 236(2), (2)(j), 305

Companies (Winding-Up) Rules 1974 r 142(3)

SY Lee (ST Lee & Partners) for the applicant in D25–7 of 2007.

Leonard Yeoh (MF Lim with him) (Tay & Partners) for the applicant/liquidator in D28–168 of 2003.

Leonard Yeoh (MF Lim with him) (Tay & Partners) for the respondent in D25–7 of 2007.

SY Lee (ST Lee & Partners) for the contributories/shareholders in D28–168 of 2003.

Paramaspary Anjunan (current liquidator)(Department of Insolvency) for official receiver in D28–168 of 2003.

Varghese George JC:

NOTICE OF MOTION NO P9(D6)-25–7 OF 2007

[1] The hearing before me involved two separate diametrically opposed applications which arose from two separate proceedings filed in court but which were commonly related to the liquidation of the same company. The applications centered around common issues of law and of facts and hence it was by consent heard together for purposes of expediency.

[2] The company in liquidation was one Fokas Perkasa Sdn Bhd ordered to be wound up by the court on 11 March 2004 in KL High Court Companies (Winding-Up) No D3–28168 of 2003 on the petition presented by one Serampai Istimewa Sdn Bhd. The official receiver had been initially appointed by court to be liquidator of the company. However on 21 July 2004 the court proceeded to appoint:

(a) Mr Heng J, Leng (Mr Heng) and

(b) Mr Michael Joseph Monteiro (Mr Monteiro)

jointly and severally to replace the official receiver as liquidator of the said company.

[3] This particular proceedings, Notis Usul D6–25–7 of 2007, was an action brought by three shareholders/contributories of the said company against Mr Heng and Mr Monteiro for declarations that three items of payments made by

them in their capacity as liquidator were not lawful and that they should be made personally accountable to repay those sums to the funds of the company under liquidation.

[4] On the other hand, encl 59 in Companies (Winding-Up) No D3–28–168 of 2003 was an application by Mr Heng and Mr Monteiro to ratify the three items of payments referred above and further, for approval of this court to make one other additional payment.

[5] Mr Heng and Mr Monteiro had subsequent to their appointment on 4 November 2009 obtained an order of court to accept their resignation as the Liquidator of the company and for the official receiver to be (re) appointed in their place.

[6] The payments paid out from the funds of the company in liquidation, in contention as between the parties were:

(a) Mr Heng and Mr Monteiro's remuneration as liquidator in the sum of RM93,937.95 which had already been effected and paid out from available funds of the company.

(b) The cost of the winding up petition awarded to the petitioner in the sum of RM65,000, which had been paid to one Mr Lum Wai Num (Mr Lum), a Director then of Serampai Istimewa Sdn Bhd ('the petitioner').

(c) Legal costs incurred by the Liquidator totaling a sum of RM66,420 paid to the following legal firms:

(i) Messrs Lee Swee Seng & Co;

(ii) Messrs HL Teh & Associates; and

(iii) Messrs Wan Ewe Chong & Khoo

The 'payment' which had yet to be effected but for which approval was being sought (in encl 59) by Mr Heng and Mr Monteiro was:

(d) Cost and expenses in the sum of RM34,818 outstanding and due to another legal firm, Messrs Lai & Associates.

[7] In respect of the issue pertaining to the remuneration of the liquidator counsel for Mr Heng and Mr Monteiro raised the preliminary question as to the competency of the shareholder/contributories to bring proceedings in respect of this matter or to challenge the liquidator's remuneration. Counsel referred to the decision in *Perumahan NCK Sdn Bhd v Mega Sakti Sdn Bhd* [2005] 7 MLJ 389; [2005] 7 CLJ 370 and highlighted that Mr Heng and Mr Monteiro's application was being brought pursuant to s 232(3)(c) of the Companies Act 1965 ('the Act'). Section 232(3) of the Act reads:

232...

(3) A liquidator other than the Official Receiver shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined —

(a) by agreement between the liquidator and the committee of inspection, if any;

(b) failing such agreement or where there is no committee of inspection by a resolution passed at a meeting of creditors by a majority of not less than three-fourths in value and one-half in number of the creditors present in person or by proxy and voting at the meeting and whose debts have been admitted to vote, which meeting shall be convened by the liquidator by a notice to each creditor to which notice shall be attached a statement of all receipts and expenditure by the liquidator and the amount of remuneration sought by him; or

(c) failing a determination in a manner referred to in paragraph (a) or (b), by the Court.

Section 232(4) and s 232(5) are also reproduced here as they are relevant as well as would be referred later in this judgment:

Where the salary or remuneration of a liquidator is determined in the manner specified in paragraph (3)(a) the Court may, on the application of a member or members whose shareholding or shareholdings represents or represent in the aggregate not less than ten per centum of the issued capital of the company, confirm or vary the determination.

Where the salary or remuneration of a liquidator is determined in the manner specified in paragraph (3)(b) the Court may, on the application of the liquidator or a member or members referred to in subsection (4), confirm or vary the determination.

In *Perumahan NCK Sdn Bhd*, Ramly Ali J (as he then was) made the following observations:

It is clear that under s 232(3) of the Companies Act 1965 and r 142(3) of the Companies (Winding-Up) Rules 1972, liquidators are entitled to be paid remuneration for their works done on behalf of the court and the court has jurisdiction to determine the liquidators remuneration.

...

From express wording of s 233(sic) of the Companies Act 1965, the only parties that can be represented at the fixing of the remuneration are liquidators and the creditors. The director of the respondent company has no right at all to participate or to be heard as such on any application to the court for fixing of the liquidator's remuneration. Shareholders, however are provided with a right to apply to court to vary or confirm the remuneration which has been fixed by agreement with the committee of inspection by virtue of sub-s (4) of s 232, …

[8] The response of the shareholders, that is, the applicants in Notis Usul

D6–25–7 of 2007, was that they had an overriding right pursuant to s 305 of the Act to question the remuneration of the liquidator, which in this case had been appropriated to themselves by Mr Heng and Mr Monteiro. This they say, they were entitled to do by way of separate proceedings, as is being pursued now in this Notis Usul.

Section 305(1) of the Act, in turn reads:

> 305 Power of Court to assess damages against delinquent officers, etc
>
> (1) If in the course of winding up it appears that any person who has taken part in the formation of the company or any past or present liquidator or officer has misapplied or retained or become liable or accountable for any money or property of the company or been guilty of any misfeasance or breach of trust or duty in relation to the company, *the Court may on the application of the liquidator or of any creditor or contributory examine into the conduct of that person,* liquidator or officer and compel him to repay or restore the money or property or any part thereof with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust or duty as the Court thinks just.

[9] In the event, I agreed with Ramly J's reading of s 232(3), (4) and (5) as above, that in an application brought pursuant to s 232(3)(c) of the Act, a shareholder was *not* entitled to bring or be heard on an issue related to remuneration of a liquidator. The intention of the legislature is clearly discernable since the right of intervention in such matters is restricted, in so far as a shareholder is concerned, to issues arising in circumstances under:

(a) s 232(3)(a) pursuant to s 232(4); and

(b) s 232(3)(b) pursuant to s 232(5)

of the Act.

Notwithstanding the same, as I was also simultaneously disposing the application brought by the shareholders here in D6–25–7 of 2007, I agreed with counsel for the shareholders that her clients, could *pursuant to s 305 of the Act*, seek to have their grievances in respect of the 'remuneration' of the liquidator be also determined by the court that is, overriding the limitation on shareholders that is obvious from a reading of s 232(3)(c).

[10] Having ruled accordingly, I considered the complaint of the shareholders, which was that Mr Heng and Mr Monteiro had already paid to themselves the sum of RM95,937.95 as liquidator's remuneration for the year 2005 *without obtaining prior approval* to do so under s 232(a) or (b) or (c). The fact that *no prior approval was obtained* is not in dispute here.

[11] Counsel for the shareholders contend that the court did not have the

jurisdiction to now 'approve' a payment already made to themselves by Mr Heng and Mr Monteiro. In other words, it was argued that this court could not retrospectively give approval for such a payment of remuneration. Further it was pointed out that this application for ratification was only in any event being brought by Mr Heng and Mr Monteiro (in D3–28–168 of 2003) some two years after the event.

[12] Counsel for Mr Heng and Mr Monteiro however referred to me the decision in *Re Bridal Central Co Pty Ltd* (1985) 9 ACLR 481 as authority for their position that a liquidator was entitled not only to be paid a remuneration but they were entitled to pay themselves the same and seek the ratification of the court for such payment. *Re Bridal Central*, was cited with approval in *Perumahan NCK* and Ramly Ali J (as he then was) went ahead in our local case there to ratify amounts already appropriated previously by a liquidator to account of their remuneration.

[13] It was clear, as was pointed out further to me, that even where there was no committee of inspection in place (as was the case here), by r 142(3) of the Companies (Winding-Up) Rules 1974, a liquidator was always entitled to remuneration, which, unless ordered otherwise by the court, would follow the scale of fees and percentages for the time being payable to official receiver discharging duties as a liquidator.

Here too there was no requirement that 'prior approval' had to be secured first. It could therefore only mean, firstly, that a private liquidator is entitled to be paid remuneration, and, secondly, that such entitlement or payment is not subject to any *prior approval* of the court before it is availed of by the liquidator.

[14] To me, in a situation where there is no committee of inspection in place (to fix remuneration of a liquidator), it would make no sense at all to impose a condition that the private liquidator appointed by the court to take charge of a winding up process, must in all instances approach the court first *for approval* before being paid remuneration from available funds of the company under liquidation. In similar vein, there is no condition imposed anywhere for approval to be obtained for all expenses and disbursements before it being incurred.

If such a condition were to be read into the provisions (where there is none), it would no doubt mean delay, additional work and expenses to be incurred by the liquidator and that could not have been the intention of the legislature in regulating the liquidation process.

[15] A distinction has to be drawn between:

(a) attending to and effecting payments that are necessary and incidental to the winding up or liquidation work at hand; and

(b) the reasonableness of the amounts incurred, appropriated or paid out.

There are sufficient safeguards in the statutes, including for shareholders (s 305), to check the liquidator in so far as the latter issue of reasonableness of their remuneration and expenses are concerned or generally their conduct in that capacity.

[16] I therefore did not accept the contention of the shareholders that Mr Heng and Mr Monteiro had to get prior approval of the court in this case and that they could not apply retrospectively for approval or ratification of sums paid or appropriated as liquidator's remuneration. There was no authority referred to me in any case which contradicted the decision upholding ratification in *Perumahan NCK*.

[17] Having disposed the two over-arching issues to the effect as stated in paras 7 and 8 of this grounds of decision, I then considered the issues related whether the payments were justified, and if so, the reasonableness of the related separate quantum involved, in each of the four heads or items of 'payment' by the liquidator which was in contention between the parties as identified in para 6.1 of this grounds of decision.

[18] The *first item* in contention was the total sum of RM93,937.95 which Mr Heng and Mr Monteiro had paid out to themselves from the funds with them as liquidator of Fokas Perkasa under liquidation. This sum was constituted of RM85,000 as fees and RM8,937.95 as disbursements incurred by the liquidator in discharging the duties of that office. As explained by counsel for the Mr Heng and Mr Monteiro, the fees charged was only for attendances up to 30 June 2006, in any case, although Mr Heng and Mr Monteiro, jointly and severally was the liquidator for the period for 2004 to 2009 (ie when they were formally allowed to resign by the court).

For purposes of comparison, Mr Heng and Mr Monteiro produced and I had for reference, a working of fees due to them if it was charged on a time-cost basis and this exceeded the sum of RM300,000 for all the related attendances, including court proceedings in respect of this liquidation.

[19] The shareholders' argument was that the fees of RM85,000 was unreasonable in all the circumstances and further that there were no supporting invoices or receipts in respect of the sum denoted as 'disbursements' incurred by Mr Heng and Mr Monteiro.

[20] I did not find any merit in the stand of the shareholders. Customarily, in professional practice, all disbursements are reimbursable; some may be supported by receipts, but normally such reimbursables would follow charges fixed by the practice, like for instance, mileage claims of different category of

staff/officers, photocopying charges etc. In our case, an explanation was forthcoming as to the somewhat large sum incurred as photocopying charges, namely, that upon taking over as liquidator, Mr Heng and Mr Monteiro had to make copies of voluminous documents of the company as a matter of course and of necessity.

As regards, the remuneration charged, the summary of work provided did not appear to me to be outside the scope of normal liquidator's duties and functions and given the time span Mr Heng and Mr Monteiro were in office, I did not find anything exceptional or untoward to substantiate any grounds at all to strike down the same.

[21] I was therefore satisfied that the appropriation of the said sum of RM93,937.95 by Mr Heng and Mr Monteiro should be approved and/or ratified as prayed for in encl 59 in Companies (Winding-Up) No D3–28–168 of 2003.

[22] The *second item* in dispute was a sum of RM65,000 that had been paid out by Mr Heng and Mr Monteiro as 'agreed cost' to Mr Lum, a Director of Serampai Istimewa Sdn Bhd, the petitioner, in respect of the proceedings, Companies (Winding-Up) No D3–28–168 of 2003.

[23] The thrust of the shareholders' attack was that there was some 'hanky-panky' between Mr Heng and Mr Monteiro, on the one side and Mr Lum on the other, in the payment of cost for the winding up petition being not paid (as is usual) to the petitioner's company or its solicitors, but in this case to Mr Lum instead. Counsel for the shareholders submitted that the original order of court in respect of costs of the petition was for it 'to be taxed' but this part of the order had been amended to 'agreed sum in lieu of taxation' with the Mr Heng and Mr Monteiro agreeing to it.

It was also part of their complaint that the cheque for payment was dated 13 January 2005, ie one day before the order of court was varied as aforesaid and also before the liquidator had formally agreed to the sum of RM65,000 in lieu of taxation which was only on 17 January 2005. The nub of the complaint was that the 'costs' paid out of the monies of the company under liquidation ended up in the hands of Mr Lum and not Serampai Istimewa or their solicitors. The shareholders wanted this court to infer from the above scenario that this payment was 'irregular' or 'tainted' and Mr Heng and Mr Monteiro ought to be made personally liable to repay that sum to the company under liquidation.

[24] It was, on the other hand, pointed out by counsel for Mr Heng and Mr Monteiro that:

(a) the negotiations to vary the winding up order of court in respect of the

costs of the petition to read 'in lieu of taxation' was between *solicitors* for Serampai Istimewa and the liquidator and not between Mr Lum and the liquidator;

(b) Serampai Istimewa had the authority to direct how the payment of 'cost' should be made and had in fact issued a letter of authority to the liquidator to effect payment of the agreed costs of RM65,000 directly to Mr Lum who was a director/shareholder of the company;

(c) to settle 'costs' of the winding up petition was a necessary item of expenses of the company under liquidation as ordered by the court and to the present Serampai Istimewa (the petitioner) or for that matter any other person interested has not brought any conflicting claim for that costs; and

(d) the cheque might have been dated earlier (in the light of negotiations leading up to the variation to the court order by consent) but there was no evidence shown as to when it was released or banked in to provide the court with any grounds to draw an adverse conclusion against Mr Heng and Mr Monteiro. It was urged on me that general doubts cannot equate to fraud and I should therefore reject the shareholders accusations.

[25] On a balance, I agreed with counsel for Mr Heng and Mr Monteiro. The 'shareholders' had the burden to show that this payment was outside the scope of the liquidators' duties and was one tainted with illegality or 'collusion' to cause a depletion of the available proceeds of the company in liquidation. I found no such evidence. The shareholders had not discharged the burden on them as aforesaid to strike down this payment and to make Mr Heng and Mr Monteiro, personally liable for the amount involved.

[26] The *third area* in contention between the parties was in respect of legal costs paid by the liquidator to three firms of solicitors, totaling in a sum of RM66,420.

[27] The sums paid to Messrs Lee Swee Seng & Co (RM5,507) and to Messrs Wan Ewe Chung & Khoo (RM6,800) were in respect of opinions rendered by the said firms to Mr Heng and Mr Monteiro. I failed to find any reasons why these payments should not be upheld. The shareholder's argument that more details of the legal work undertaken were required, was totally unmeritorious.

[28] The sum paid out to Messrs HL Teh & Associates (RM54,113) and the sum of RM34,818 yet to be paid to Messrs Lai & Associates (for which approval was being sought by Mr Heng and Mr Monteiro here) both relate to a court proceedings under reference D23–25–14 of 2004. This is best dealt with therefore together with the fourth area of dispute.

[29] The *fourth area of dispute* between the parties was in respect of the sum of RM34,818 due and payable to Messrs Lai & Associates. Mr Heng and Mr Monteiro sought approval for release of this sum (since handed over to the official receiver) to that firm of solicitors but this was opposed by the shareholders.

[30] As stated above, both this sum to be paid and the sum already paid Messrs HL Teh & Associates, were fees payable to the respective solicitors for work related to proceedings *D23–25–14 of 2004*. It was not in dispute that the proceeding involved a *stay application brought by the shareholders themselves* in respect of the order of the court to wind up Fokas Perkasa.

[31] In opposing the ratification of the sums paid to Messrs HL Teh & Associates and the approval sought to pay Messrs Lai & Associates, the shareholders contended that the liquidator should not have involved themselves in the proceedings. They argued that it was merely a proceeding between the shareholders and the petitioner (Serampai Istimewa). The Liquidator (Mr Heng and Mr Monteiro) should not have involved themselves at all as it was not an action 'for Fokas Perkasa', or in 'defending Fokas Perkara'. Counsel for the shareholders referred to s 236(2) and argued that the liquidator was not a party named in the proceeding for such payment to be recognised as necessary and consequently ratified or approved at all.

[32] However as highlighted by counsel for Mr Heng and Mr Monteiro, the stay application was in respect of the winding up of Fokas Perkasa of which Mr Heng and Mr Monteiro were jointly and severally the liquidator. They had stepped into the shoes of the directors of the company once the winding up order was granted. The liquidator had legitimate concerns not just about the progress of the winding up process but also because there were serious allegations made personally against Mr Heng and Mr Monteiro. They had to defend themselves in that capacity and the liquidator was therefore a necessary party since they were liable to be sued for monies unless all relevant facts were adequately set before the court. They had to file affidavits as liquidator of the company as a matter of course in that proceeding.

(Incidentally the said stay application of the shareholders was dismissed at the High Court stage and the appeal by the shareholders thereform to the Court of Appeal was also unsuccessful.)

[33] The material parts of s 236(2) are as follows:

> 236(2) The liquidator may —
>
> (a) bring or defend any action or other legal proceeding in the name and on behalf of the company;
>
> ...

A ...

(d) do all acts and execute in the name and on behalf of the company all deeds, receipts and other than documents and for that purpose use when necessary the company's seal;

B ....

...

...

...

C (i) appoint an agent to do any business which the liquidator is unable to do himself; and

(j) do all such other things as are necessary for winding up the affairs of the company and distributing its assets.

D **[34]** I agreed with counsel for Mr Heng and Mr Monteiro that the liquidator was not restricted by s 236(2) but could intervene or include themselves if the interests of the company being wound up or their position as liquidator of the company is called into question in court proceedings. It was not restricted to proceedings 'in the name and on behalf of' the company.

E This is adequately supported by the words of s 236(2)(j) which is wide in scope to encompass situations where the liquidator is not necessarily a named party but the intervention of the liquidator is nevertheless necessary, particularly in the context of the liquidator's duty to adequately protect the rights of creditors generally, to ensure that the value of the realisable assets of the company being wound up is not depleted or the process of liquidation delayed.

F In this case there was the further element of the liquidator's conduct being challenged by the applicants for the stay, who were the very same shareholders now opposing the legitimate legal expenses incurred by the liquidator.

G **[35]** Accordingly, I allowed encl 59 in proceedings D3–28–168 of 2003 as follows:

(a) the appropriation of the sum of RM93,937.95 by Mr Heng and Mr Monteiro as their remuneration and disbursements during their term of office as liquidator was approved and/or ratified;

H

(b) the sum of RM66,420 paid as legal costs between 12 July 2004 to 18 August 2005 by Mr Heng and Mr Monteiro was approved and/or ratified;

I

(c) the cost of the winding up petition ordered in favour of the petitioner and agreed subsequently to be RM65,000 in lieu of taxation and paid to Mr Lum was approved and/or ratified;

(d) the further legal fees of RM34,818 payable to Messrs Lai & Associates,

the sum whereof were presently in the hands of the official receiver, is approved for payment and the official receiver was directed to effect the same; and

(e) there be no order as to costs by agreement of parties in respect of encl 59 here.

[36] In the light of the order of this court as aforesaid in D28–168 of 2003 as aforesaid, encl 5 in proceedings D25–7 of 2007, (ie this proceeding) was dismissed with costs.

The agreed costs to be paid by applicants here (the shareholders) to Mr Heng and Mr Monteiro was fixed at RM20,000.

Shareholders/contributories application dismissed with costs.

Reported by Ashgar Ali Ali Mohamed